

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

GREGORY R. THEILE,	:	APPEAL NO. C-090480
	:	TRIAL NO. 09CV-03450
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
GURUNATH R. MALLAPRAGADA,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant, Gurunath R. Mallapragada, appeals the trial court's decision granting summary judgment in favor of plaintiff-appellee, Gregory R. Theile. We find no merit in his assignment of error, and we affirm the trial court's judgment.

The record shows that Theile filed a complaint against Mallapragada seeking to recover damages relating to an automobile accident. On April 16, 2009, the court journalized an entry ordering discovery to be completed by June 30, 2009, and all dispositive motions, including motions for summary judgment, to be served by July 9, 2009. It also granted leave to file those motions.

On May 20, 2009, long before the final date for serving the motions, Theile filed his motion for summary judgment. He supported the motion with an affidavit stating that Mallapragada's light was red when he went through an intersection and hit Theile's car. The affidavit also set forth the amount of damages Theile had incurred.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

On June 9, 2009, Theile filed a motion to compel discovery, in which he contended that Mallapragada has failed to respond at all to his discovery requests. He asked the court to order Mallapragada to comply and to award him attorney fees.

On June 11, 2009, the trial court granted Theile's motion for summary judgment. It entered judgment for Theile in the amount of \$9,075 plus costs. Nevertheless, the entry journalizing the court's decision, while dated June 11, was not filed until June 15. Also on June 11, Mallapragada filed a motion for additional time to respond to Theile's motion for summary judgment.

On July 7, 2009, the court issued an entry disposing of Mallapragada's motion for additional time. It stated that "[t]he plaintiff served his motion for summary judgment on May 20, 2009. The deadline for responding to the motion was June 8. Loc. R. V(4). The court granted summary judgment on June 11, although for reasons unclear the clerk did not enter it on the journal until June 15. After judgment was granted, and after regular business hours on June 11 (4:02 p.m.)[,], the defendant filed the instant motion by a facsimile transmission."

The entry went on to state that "[h]ad this Civ. R. 56(F) motion been timely filed it would not have been well taken because it was not supported by an affidavit as required by the rule. At this point, however, since judgment has been entered, it is a nullity."

Mallapragada filed a notice of appeal within 30 days of the court's July 15, 2009, entry granting summary judgment. Therefore, his appeal is properly before this court.²

In his sole assignment of error, Mallapragada contends that the trial court erred in granting Theile's motion for summary judgment. He argues that the trial court's decision granting summary judgment was premature because Theile, the moving party, had not completed discovery, as evidenced by his motion to compel discovery, and did not have

² See App.R. 4(A); *Monahan v. Duke Realty Corp.*, 1st Dist. No. C-070318, 2008-Ohio-1113.

the evidence necessary to establish the absence of genuine issues of material fact. This assignment of error is not well taken.

As the trial court noted, Mallapragada's motion for additional time was not timely filed. Hamilton County Municipal Court Loc.R. V(4) states that "any memorandum contra to" a motion filed by another party "shall be served on the movant's attorney * * * within fourteen (14) days from the date the memorandum in support of the motion and proof of service thereof, was served. Failure to serve a memorandum contra may be cause for the court to grant the motion as served."

The Ohio Supreme Court has held that a trial court need not notify the parties of the date of consideration of a motion for summary judgment or the deadlines for submitting materials supporting or opposing the motion if a local rule of court provides sufficient notice of the hearing date or submission deadlines.³ Thus, the local rule in this case gave Mallapragada notice of the date by which he had to file a response to Theile's motion. Since Mallapragada failed to timely file any response to Theile's motion for summary judgment, the trial court could properly have granted the motion after 14 days.⁴

Further, Civ.R. 56(F) requires a party seeking a continuance to provide affidavits showing the need for it. This court has said that the party opposing summary judgment must follow the provisions of Civ.R. 56(F) when seeking a continuance. If that party does not, the court is free to consider the merits of the motion for summary judgment.⁵ Since Mallapragada failed to file an affidavit supporting his motion, the trial court was within its discretion to overrule it and to consider Theile's motion on the merits.⁶

³ *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, 795 N.E.2d 648; *Ameritech Publishing, Inc. v. Griffin*, 2nd Dist. No. 2009 CA 18, 2009-Ohio-5602.

⁴ See *Hooten*, supra; *Ameritech Publishing*, supra; *Nichols v. Staybridge Suites*, 10th Dist. No. 08AP-773, 2009-Ohio-1381.

⁵ *Thomas v. Cranley* (Nov. 2, 2001), 1st Dist. No. C-010096; *Grange Mut. Cas. Co. v. State Automobile Mut. Ins. Co.* (1983), 13 Ohio App.3d 217, 468 N.E.2d 909.

⁶ See *Scaccia v. Dayton Newspapers, Inc.*, 170 Ohio App.3d 471, 2007-Ohio-869, 867 N.E.2d 874; *Drake Constr. Co. v. Kemper House Mentor, Inc.*, 170 Ohio App.3d 19, 2007-Ohio-120, 865 N.E.2d 938.

Mallapragada argues that the trial court, by granting the motion for summary judgment before its stated cutoff date, prematurely stopped discovery. He points to Theile's motion to compel discovery as proof that discovery still needed to be completed. He relies on a case from another district, *Mann v. Smalley*,⁷ in which the court held that the trial court's granting of a motion for summary judgment while a motion to compel discovery was pending was premature and did not afford the court the opportunity to consider all the facts necessary to rule as matter of law that no material issues of fact existed.

"Decisions which preclude the party seeking discovery from finding the facts necessary to establish their case prejudice the party and are a violation of due process. Trial courts abuse their discretion when they reward a party willfully noncomplying with discovery by disposing of the case without ordering the noncomplying party to provide the requested discovery."⁸

But in that case, the party opposing summary judgment filed the motion to compel discovery. In this case, Theile, the party moving for summary judgment, filed the motion to compel, and Mallapragada was the party who was not complying with discovery. Mallapragada was not prejudiced by the court's decision precluding Theile from seeking discovery, and he cannot rely on Theile's motion to compel discovery to excuse his own lack of compliance with Civ.R. 56(F). If Mallapragada believed that he needed more time to conduct discovery, he needed to comply with the rule and file a motion for a continuance with a supporting affidavit in a timely fashion.

Despite his motion to compel discovery, Theile supported his motion for summary judgment with evidence showing that Mallapragada had negligently caused the

⁷ (May 2, 1991), 8th Dist. No. 58320.

⁸ *Biddle v. Biddle* (Dec. 12, 2000), 2nd Dist. No. 2000CA 67, citing *Mann*, supra.

automobile accident and that Theile was entitled to judgment as a matter of law.⁹ The party opposing a motion for summary judgment may not rest upon the pleadings, but must present, by affidavit or otherwise, specific facts showing that a genuine issue of fact exists for trial.¹⁰ Since Mallapragada did not do so, the trial court did not err in granting Theile's motion for summary judgment. We overrule Mallapragada's assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on April 28, 2010

per order of the Court _____.
Presiding Judge

⁹ See *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267; *Stinespring v. Natorp Garden Stores* (1998), 127 Ohio App.3d 213, 711 N.E.2d 1104.

¹⁰ Civ.R. 56(E); *Stinespring*, supra.